IN THE

Supreme Court of the United States

FEB 1 1967
JOHN F. DAVIS, CLERK

October Term, 1966
No. 483

NEIL REITMAN, *et al.*, and CLARENCE SNYDER,
Petitioners,

vs.

LINCOLN W. MULKEY, *et al.*, and WILFRED J. PRENDERGAST and CAROLA EVA PRENDERGAST,
Respondents.

On Writ of Certiorari to the Supreme Court of the State of California.

BRIEF FOR PETITIONERS.

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Kauper, Civil Liberties and the Constitution, University of Michigan Press (1962), Ch. IV, pp. 127, 166	51
Lewis, The Sit-in Cases; Great Expectations, The Supreme Court herein, University of Chicago Press (1963), p. 101	27, 36
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Lewis, The Sit-in Cases: Great Expectations, The Supreme Court Review, University of Chicago Press (1963), p. 145, n. 100	41
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14 Stanford Law Review (1961), (Case 17, p. 50), p. 3 51

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Respondents.

Brief for Petitioners on Writ of Certiorari to the Supreme Court of the State of California.

Introduction.

Respondents Mulkey are Negroes who were refused as tenants by petitioner Reitman in his private apartment building. Respondents Mr. Prendergast, a Negro, and his Caucasian wife, were given a thirty-day notice of termination of their oral month-to-month tenancy in the private apartment dwelling owned by Petitioner Snyder. In two separate actions, respondents sued petitioners under a 1959 statute prohibiting racial discrimination in rentals of such apartments. In 1964, by a vote of 4,526,460 to 2,395,747, the California Constitution was amended by the adoption of Proposition 14, which repealed the portions of the statute relied upon by respondents. The California Supreme Court held for respondents, deciding that Proposition 14 offended

the Fourteenth Amendment; and in the *Prendergast* case the court also held that a State court could not constitutionally recognize or enforce Mr. Snyder's otherwise valid termination of an oral tenancy if his motives were based upon the race of his tenant. These are the two judgments here on certiorari.

Opinions Below.

The majority opinion of the Supreme Court of California in *Mulkey, et al. v. Reitman, et al.* [R. 14] is reported in 64 Cal. 2d 529, 50 Cal. Rptr. 881, 413 P. 2d 825. Two dissenting opinions [R. 31, 49] are reported in 64 Cal. 2d 545 and 559, 50 Cal. Rptr. at 892 and 901; 413 P. 2d at 836 and 845.

The memorandum opinion of the Superior Court of Los Angeles County in *Prendergast v. Snyder* is unreported [R. 71]. The majority opinion of the Supreme Court of California [R. 81] is reported in 64 Cal. 2d 877, 50 Cal. Rptr. 903, 413 P. 2d 847. Two justices dissented [R. 84, 64 Cal. 2d 879, 50 Cal. Rptr. at 905, 413 P. 2d at 849.]

Grounds of Jurisdiction.

The judgments below were entered on May 10, 1966 [R. 14, 81]. A timely petition for rehearing was denied on June 8, 1966 [R. 86, 87]. The Petition for Certiorari was filed August 25, 1966 and granted on December 5, 1966 [R. 88]. The jurisdiction of this Court arises under 28 U.S.C. §1257(3) to review judgments declaring a State constitutional provision invalid under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.[1]

[1]Referred to hereinafter, for brevity, as the equal protection clause.

Constitutional Provisions and Statutes Involved.

The constitutional provisions involved are Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 26 of Article I of the California Constitution, adopted as an initiative measure (Proposition 14) at the general election on November 3, 1964.

Section 1 of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The operative portion of Section 26 of Article I of the California Constitution (hereinafter referred to as Section 26) provides:

> "Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses."

The balance of the measure defines "person" so as to exclude the State and its subdivisions, defines "real property" as residential property, excludes public accommodations, and sets forth a severability clause

(App. 1-2). The full text of Section 26 together with the official ballot arguments are submitted herewith (App. 1-2), as are the pertinent provisions establishing the initiative powers contained in Article IV, Section 1 of the California Constitution (App. 8).

Statutes involved are (i) California Civil Code, Sections 51 and 52 (App. 8-9) as amended in 1959, which will be referred to herein as by the Court below as the "Unruh Act" and (ii) California Health and Safety Code, Section 35700 *et seq.* as amended in 1963 (material portions printed at App. 10-11), which will be referred to herein as by the court below as the "Rumford Act".

Questions Presented.

1. Does the adoption of a State constitutional amendment providing that the State shall not deny the right of an owner of private residential property to decline to sell or rent his property to such person as he chooses, sufficiently involve the State in the private conduct of an individual who refuses to lease his property on grounds of race so as to violate the equal protection clause?

2. Does the equal protection clause itself create an affirmative obligation upon a State to prohibit, or provide a remedy against, or preclude a State from repealing statutory remedies against, racial discrimination in the sale or rental of privately-owned residential property?

3. Does the equal protection clause itself require a State to deny judicial recognition of a landlord's right to possession of his property solely on the ground that he acquired or exercised such right because of the race of his tenant?

4. Did the State court deprive petitioner Snyder of his property without due process of law, or deny him the equal protection of the laws, by refusing, upon the basis of the equal protection clause itself, to recognize or enforce a right to possession available to all landlords, solely on the ground that Mr. Snyder acquired or exercised his right to possession of the apartment involved because one of the married tenants thereof was a Negro?

5. Does the judiciary, State or federal, have the power to invalidate under the equal protection clause a popularly enacted initiative amendment to a State constitution which establishes a policy of nonregulation of private conduct which the State may, but is not required, to regulate?

Statement of the Cases.

Both judgments under review are based squarely on the proposition that Section 26 violates the Fourteenth Amendment to the federal Constitution.[2] The judgment in *Prendergast* was based on the additional ground that the court was barred by the Fourteenth Amendment

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[2]Thus, the California Supreme Court said: "Our resolution of the question of constitutionality [of Section 26 Article I] is confined solely to federal constitutional considerations." [64 Cal. 2d at p. 533, 50 Cal. Rptr. at p. 884, 413 P. 2d at 884, R. 17]; and later: "We are now confronted with those questions"; *i.e.*, " 'grave questions whether the . . . amendment to the California Constitution is valid under the Fourteenth Amendment to the United States Constitution' " [64 Cal. 2d at p. 535, 50 Cal. Rptr. at p. 885, 413 P. 2d at 885, R. 19]. Further: "Article I, section 26, of the California Constitution thus denied to plaintiffs and all those similarly situated the equal protection of the laws as guaranteed by the Fourteenth Amendment to the federal Constitution, and is void in its general application." [64 Cal. 2d at p. 545, 50 Cal. Rptr. at p. 892, 413 P. 2d at 892, R. 31]. The *Prendergast* judgment was based in part upon this same ground. [64 Cal. 2d 879, 50 Cal. Rptr. at 904-905, 413 P. 2d 904, R. 83].

from giving any relief to a landlord who exercised his right to terminate an oral tenancy on the grounds his tenant was a Negro [R. 71-78, 83-84].

There is no factual dispute. In each case a Negro prevailed over a white landlord who had refused on grounds of race to rent, or to continue to rent, privately-owned residential property.[3] The material proceedings in each case were:

1. Mulkey v. Reitman.

This was an action for damages and injunctive relief commenced in 1963 under the provisions of the Unruh Act against the owner of an apartment building for refusal to rent an apartment to plaintiffs because they were Negroes [R. 2-5]. Following the subsequent adoption of Section 26, the trial court dismissed the action on defendants' motion, solely upon the ground that the latter provision rendered the statutes "upon which this action is based null and void." [R. 10-12]. Plaintiffs unsuccessfully opposed the motion solely on the ground that Section 26 was unconstitutional under the State and federal Constitutions [R. 12]. The Supreme Court of California, with two justices dissenting, reversed, placing its decision entirely upon the federal ground that Section 26 contravened the equal protection clause [R. 14, 17, 31].

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[3]In a related decision, *Hill v. Miller*, 64 Cal. 2d 757, 51 Cal. Rptr. 689, 413 P. 2d 852, App. 15, the Court below rendered judgment for the landlord of a single family residence. As will appear (*infra*, pp. 40, 55) this decision is essential to an understanding of the precise basis of decision of the Court below in the cases here under review.

2. Prendergast v. Snyder.

This was an appeal by Mr. Snyder from an adverse judgment on his cross-complaint for declaratory relief against Mr. and Mrs. Prendergast, respectively a Negro and a Caucasian [R. 63-67, 79]. Mrs. Prendergast had rented an apartment from defendant in his seven-unit dwelling on an oral month-to-month tenancy. Later Mr. Prendergast moved into the apartment, and in December, 1964 Mr. Snyder gave his tenants a 30-day written notice of termination of the tenancy [R. 64]. That this notice complied fully with the nondiscriminatory laws of California relating to tenancies at will is not disputed.

After receipt of the notice of termination, plaintiffs sought an injunction against their eviction, relying upon the Unruh Act and urging that statute was in full force notwithstanding the adoption of Section 26 because the latter violated the Fourteenth Amendment [R. 73].

By cross-complaint, Mr. Snyder sought a declaration that the tenancy had been terminated and that he was entitled to possession [R. 63]. It was undisputed that Mr. Snyder terminated the tenancy because he and his wife did not desire to live in the subject apartment building so long as Mr. and Mrs. Prendergast were there, because he did not desire at the present time to rent any of the apartments to Negroes, and because he was faced with severe economic hardship from the threatened loss of rentals from half of his remaining tenants who also did not desire to live in the apartment building so long as the Prendergasts were there [R. 64-65, 59-62, 67-69].

In his cross-complaint, Mr. Snyder asserted his rights (1) to select the persons with whom he would associate, both in the relationship of landlord and tenant and in the continuing relationship of neighbors under the same roof, (2) to acquire, use, enjoy and dispose of his property in any manner he might choose which was not prohibited by statute, ordinance or other legislation, (3) to decline to rent to any particular person or persons or terminate such rental even if his unexpressed reason therefor was the race or religion of the person or persons involved, and (4) to have a court of law recognize and enforce the termination of the Prendergasts' tenancy [R. 65-66, 72].

The trial court found it unnecessary to determine whether Section 26 was valid under the Fourteenth Amendment [R. 73-74]. Relying on *Shelley v. Kraemer,* 334 U.S. 1, it held that the Fourteenth Amendment barred a State court from granting petitioner any judicial relief [R. 80]. With two justices dissenting, the Supreme Court of California affirmed upon the ground that Section 26 violated the Fourteenth Amendment "as well as those [grounds] relied upon by the trial court * * *." [R. 83-84, 64 Cal. 2d at 879, 50 Cal. Rptr. at 905, 413 P. 2d at 847].

3. A Companion Case Below.

In *Hill v. Miller,* 64 Cal. 2d 757, 51 Cal. Rptr. 689, 413 P. 2d 852, App. 15, the court below affirmed[4] the trial court's judgment for the landlord on demurrer in an action by a Negro tenant to restrain eviction. The court gave two reasons for reaching a decision in *Hill*

[4]After granting a rehearing of its initial decision in which it had reversed the judgment of the trial court, 64 Cal. 2d 598, 50 Cal. Rptr. 908, 413 P. 2d 852.

contrary to that in *Prendergast:* (1) The single-family residence involved in *Hill,* unlike the seven-unit apartment dwelling involved in *Prendergast,* had not been covered by the Unruh or Rumford Acts, and (2) the property owner in *Hill* sought no affirmative relief as had his counterpart in *Prendergast* (64 Cal. 2d at 759 and 760, 51 Cal. Rptr. at 690, 413 P. 2d at 853).

Summary of Argument.

In adopting Section 26 the people of California have removed from a mosaic of laws prohibiting racial and religious discrimination a fragment of private conduct: The individual choice by an owner of private residential property in selecting a buyer or tenant for his own property. California continues a vigorous official policy opposed to racial discrimination in all governmental and in numerous private activities (*infra,* p. 14).

The conduct which Section 26 frees from pre-existing legislative regulation was free from regulation under the common law in California until 1959, is still free from such regulation even in the view of the court below except to the extent it is prohibited by statute (*Hill v. Miller,* 64 Cal. 2d 757, 51 Cal. Rptr. 689, 413 P. 2d 853, App. 15), and is free from governmental regulation in thirty-one of the remaining States (*infra,* p. 13).

The dispute presented in these cases is the alleged invasion by the individual petitioners of individual rights claimed by respondents respecting private residential property owned by petitioners. From the beginning, this Court has held that individual invasion of individual rights is not the subject matter of the equal protection clause. *United States v. Cruikshank,* 92

U.S. 542, 554-555; *Civil Rights Cases,* 109 U.S. 3, 11; *United States v. Guest,* 383 U.S. 745. This vital principle that *state action* is, and private action is not, prohibited by the equal protection clause is embedded in our national life as well as in the settled jurisprudence of the Fourteenth Amendment. Recognition of the principle is essential to a free, diverse, and democratic society. It forms a part of our moral philosophy "which values freedom because it calls upon man to exercise his noblest quality—the power of choice between good and evil." Freedom is freedom to be selfish or generous, mean or noble, arbitrary or rational, wrong or right. Inherent in the principle are values of federalism allowing the States an area of choice in dealing with conflicting interests and values of their citizens in light of the pressing social and economic problems of a dynamic society, instead of vesting the only power of effective decision in the federal judiciary under Section 1 of the Fourteenth Amendment. The institutional limitations of this Court, in themselves, suggest that the Constitution places no such extraordinary responsibility upon this Court (*infra,* pp. 26, 60).

By invalidating Section 26 as forbidden by the equal protection clause, the court below obliterated the doctrine that private conduct must meet the standards applicable to government only where the State is so significantly involved as to be fairly responsible for it. *Burton v. Wilmington Parking Authority,* 365 U.S. 715. The private conduct of Mr. Reitman and Mr. Snyder in refusing to rent or continue to rent their own private property is the only source of respondents' grievances. The State has no Constitutional duty to prohibit that kind of private conduct or to provide a remedy

for that kind of grievance. The fact that by Section 26 California reestablished its common law rule of nonregulation and thus repealed its statutory rule of regulation is Constitutionally irrelevant. Otherwise, we would have one equal protection clause in California and another more lenient equal protection clause in localities which have not attempted legislative regulations of discriminatory private conduct. Surely the Constitution was not meant to be read so as to vary the substantive content of equal protection rights in direct proportion to the extent of statutory regulation which the temporary incumbents of particular local legislatures decide to impose, thus resulting in the very least Constitutional rights in the very same localities having the very least statutory regulations (*infra,* pp. 17, 24, 28, 37).

This Court teaches that the high standards of conduct imposed upon the States by the Fourteenth Amendment are applicable to nominally private activities only where the State has delegated to private groups extraordinary powers to perform functions bearing a close relationship to sovereignty — such as the combination of electoral officials and "private" political parties whose function was the systematic exclusion of Negroes from participation in the only meaningful elections in certain southern States, as in *Terry v. Adams,* 345 U.S. 461; or the criminal prosecution of a citizen for attempting to express her religious views on a sidewalk open to the public at the instance of a "private" corporation whose authorized function and powers were the same as given by the State to all public municipalities, as in *Marsh v. Alabama,* 326 U.S. 501; or the conduct of "private" institutions in excluding Negroes

from access to services intended for the public generally on governmentally owned property and with substantial participation of the government, financial and otherwise, such as was involved in *Burton v. Wilmington Parking Authority,* 365 U.S. 715; or the criminal prosecution of Negroes excluded from places of public accommodations in localities where the State either required such exclusion by law, as in *Peterson v. Greenville,* 373 U.S. 244, or imposed an additional burden by law on those who did not wish to discriminate, as in *Robinson v. Florida,* 378 U.S. 153; or the conduct by the State, either through zoning ordinance, as in *Buchanan v. Warley,* 245 U.S. 60, or by Court compulsion, as in *Shelley v. Kraemer,* 334 U.S. 1, to prohibit willing sellers and buyers from transferring residential property in white neighborhoods (*infra,* pp. 30, 37).

The court below erred in attempting to apply those teachings to the individual private conduct of the petitioners in the performance of the wholly private function of choosing tenants for their own residential property. To preserve the viability of the principle that only "state action of a particular character" is reached by the equal protection clause, to maintain the integrity of the legislative prerogative to determine whether, when, and to what extent the conduct of private persons in their relationships with other private persons should be subjected to governmental regulation, and to recognize that principles of federalism leave such decisions to the States in the absence of valid acts of Congress, the judgments below must be reversed.

ARGUMENT.

I.

SECTION 26 OF ARTICLE I OF THE CALIFORNIA CONSTITUTION IS A VALID EXERCISE OF STATE LEGISLATIVE POWER IN ESTABLISHING AN EVEN-HANDED POLICY OF NONREGULATION OVER THE CONDUCT OF THE OWNERS OF PRIVATE RESIDENTIAL PROPERTY IN CHOOSING THE PERSONS TO WHOM THEY WISH TO SELL OR RENT THEIR OWN PROPERTY, WHILE AT THE SAME TIME LEAVING IN EFFECT EXTENSIVE REGULATIONS PROHIBITING RACIAL AND RELIGIOUS DISCRIMINATION IN ALL GOVERNMENTAL AND IN NUMEROUS PRIVATE ACTIVITIES.

The historical context and contemporary conditions in which Section 26 was adopted demonstrate that its purpose and effect is to leave to self-regulation the decisions of property owners in choosing buyers and tenants of their private residential property, and to rely for the time being on educational, religious, and other statutory influences to improve housing opportunities for disadvantaged groups, including racial minorities. Even after the adoption of its new constitutional amendment, California continues to have more extensive legislative prohibitions of discrimination in housing than 41 other states.[5] Furthermore, the official policy of California is opposed to religious and racial discrimination in many other fields (App. 12-14).

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[5]Fifteen states have enacted legislative prohibitions against racial discrimination in certain types of private residential housing. Six of these have broader exclusions than exist in California even after the adoption of section 26. Three states have such laws applicable only to publicly assisted housing. Thirty-one states have no such laws (App. to Pet. for Cert. 15-24).

The conduct of which respondents complain is the purely private conduct of the owners of purely private residential property. It is only the States, however, and not such private owners who are the addressees of the Fourteenth Amendment, and the States cannot be said to become so significantly involved in such private conduct as to fairly be held responsible for it simply because they do not prohibit it.

By enacting Section 26, California merely reestablished the widely recognized common law rule that a person has no right to acquire an interest in real property from its owner regardless of the owner's reasons or lack of reasons for refusing to deal with him. Such a rule does no violence to the equal protection clause, whether it be announced by State judicial decision, statute, or constitutional provision because it relates solely to the private conduct of private persons in their relationships with other private persons in the performance of a purely private function. The decision to regulate or not to regulate such conduct is the prerogative of the legislature, and the decision when made should not be disturbed by the federal judiciary under section 1 of the Fourteenth Amendment.

A. The Official Policy of California Is Opposed to Racial Discrimination.

(1) The Historical Setting in Which Section 26 Was Enacted.

There is no doubt that the official policy of California is and for many years has been one which opposes racial and religious discrimination.[6] Seventy-four

[6]In addition to the statutes discussed hereafter in the text, there are numerous laws in California which encourage and in

years ago California enacted a statute entitling all citizens to the full and equal accommodations, facilities, and privileges of all "* * * places of public accommodation or amusement * * *".[7] Over the years, this statute was amended from time to time,[8] and in 1959 it was enlarged so as to prohibit racial or religious discrimination "in all business establishments of every kind whatsoever."[9] Its present comprehensive coverage includes such "businesses" as the practice of medicine[10] and the activities of real estate brokers and all persons in the business of selling or leasing residential property.[11]

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some instances require the complete elimination of racial discrimination. A summary of these laws appears in the Appendix (pp. 12-14). See also reference to this pattern of statutes in the dissenting opinion below of Justice Thomas P. White [R. 31-34]. Neither respondents, nor the court below, have ever questioned our assertions that there is no statute, regulation, rule, municipal ordinance or policy of any governmental unit or officer in California which requires, permits, encourages or sanctions racial discrimination; or that the announcements, both official and unofficial, of our highest State constitutional officers, as well as prominent leaders in the Executive and Legislative Branches of our State Government and the statements of the Statewide chairmen of both the leading political parties, and the pronouncements of the California Supreme Court establish that every element of State Government in California strenuously opposes discrimination on the grounds of race, color, creed or national origin. No claim can honstly be made that there is a State-sponsored "mosaic" of discrimination in California. On the contrary, it has a comprehensive official policy against racial discrimination. See Brief in Opposition to Pet. for Cert. p. 16.

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[7]Cal. Stat. 1893, Ch. 185, at 220.

[8]Cal. Stat. 1897, Ch. 108, at 137; 1905, Ch. 413, at 553; 1919, ch. 210 at 309; 1923, Ch. 235 at 485.

[9]Cal. Stat. 1959, Ch. 1866, at 4424; Cal. Civ. Code, §51.

[10]*Washington v. Blampin*, 226 Cal. App. 2d 604, 38 Cal. Rptr. 235.

[11]*Lee v. O'Hara*, 57 Cal. 2d 476, 20 Cal. Rptr. 617, 370 P. 2d 321; *Burks v. Poppy Constr. Co.*, 57 Cal. 2d 463, 20 Cal. Rptr.

(This footnote is continued on the next page)

In 1959, the California Legislature also adopted the "Hawkins Act" prohibiting racial and religious discrimination in "publicly assisted housing accommodations."[12] In 1961, California proscribed restrictive covenants affecting real property and racial conditions in deeds.[13] In 1963, the Hawkins Act was superseded by the Rumford Act, which prohibited racial or religious discrimination by some but not all owners of publicly assisted and private housing and by brokers, financial institutions, and others dealing in the sale, rental, or financing of residential property.[14] This act applied to private dwellings containing more than four units and to most but not all residential property having governmental financial assistance.[15] It would not apply to a publicly assisted duplex,[16] to some single family residences,[17] or to housing accomodations of two to four units, whether or not publicly assisted.[18] The State Fair Employment Practices Commission was empowered to prevent violations and to conduct investigations, educational programs, and conciliation regarding dis-

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609, 370 P. 2d 313; *Swann v. Burkett*, 209 Cal. App. 2d 685, 26 Cal. Rptr. 286 (rental of triplex by owner). However, a real estate broker was not liable if his failure to complete the transaction was due solely to the refusal of the owner of a single family residence to sell on basis of buyer's race. *Vargas v. Hampson*, 57 Cal. 2d 479, 20 Cal. Rptr. 618, 370 P. 2d 322.

[12]Cal. Stat. 1959, Ch. 1681, at 4074; formerly Cal. Health & Safety Code §§35700-35741.

[13]Cal. Stat. 1961, Ch. 1877, at 3976; Cal. Civ. Code §§53, 782. These, of course, have been unenforceable in California at least since the decision of this Court in *Shelley v. Kraemer*, 334 U.S. 1.

[14]Cal. Stat. 1963, Ch. 1853 at 3823; Cal Health and Safety Code §§35700, *et seq.*

[15]Cal. Health & Safety Code §35720, subd. 4, 5.

[16]*Cf.*, *id.* at subd. 1-3 with 4.

[17]*Cf.*, *id.* at subd. 4 with 5.

[18]*Cf.*, *id.* at subd. 1-4 with 5.

criminatory practices in housing.[19] The act was passed in the final evening hours of the last day of the 1963 legislative session.[20]

After an abortive campaign for a referendum to repeal the Rumford Act, an initiative measure known as Proposition 14 was qualified for the ballot after the court below had declined to prohibit the Secretary of State from placing it on the ballot.[21] Proposition 14 was adopted at the November 3, 1964, General Election by a vote of 4,526,460 to 2,395,747 [R. 31] and became Section 26 of Article I of the California Constitution.

(2) The Purpose and Effect of Section 26.

Section 26 is a legislative choice that a particular method of attempting to solve the problem of housing for minorities, *e.g.*, the imposition of direct sanctions upon private residential property owners, shall not be employed at this time, thus re-establishing a policy which existed in California prior to 1959. The measure establishes non-regulation by the State over conduct in the rental or sale of residential property by its owners not only when based on racial or religious discrimination but when done for any reason or for no reason at all. Thus, the Section forbids governmental restric-

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[19]Cal. Health & Safety Code, §§35730 *et seq.*

[20]Note, "The Unconstitutionality of Proposition 14: An Extension of Prohibited 'State Action'", 19 Stan. L. Rev. 232, 237 (Nov. 1966).

[21]*Lewis v. Jordan* (1964), No. SAC 7549 [Unreported Minute Order of June 3, 1964, in which the California Supreme Court stated that while there are "grave questions whether the proposed amendment . . . is valid under the Fourteenth Amendment . . . it would be more appropriate to pass on those questions after the election . . . than to interfere with the power of the people to propose laws and amendments to the [California] Constitution and to adopt or reject the same at the polls . . ." (R. 18-19).]

tions upon the privilege of residential property owners to choose buyers or tenants based upon sex, age, size of family, existence of children, possession of pets, appearance, or whatever. The measure extends its freedom from governmental regulation of individual choice evenhandedly to all private owners of residential property when dealing with their own property without regard to their race, religion or other differences.

The provision is a declaration of neutrality in a relatively narrow area of human conduct: The exercise of the discretion of a property owner not to sell or rent his own residential property. Section 26 does not preclude the creation by legislation of housing opportunities for minority groups or the complete elimination of substandard housing by any private group or governmental body from the federal to the neighborhood level. It does not inhibit programs of relocation, programs designed to raise the educational and economic standards of minorities, direct action to expand the housing market by construction of housing, enlargement of State-financed loan programs, provisions for incentives through loan funds or other aids to those willing to agree not to discriminate, or prohibition of group discrimination, whether based upon agreement, custom or otherwise. It does not affect the existing statutory prohibitions applicable to property owned by the State or any of its subdivisions, property acquired by eminent domain, on property used for provision of lodging accommodations for transient guests (App. 1); nor does it restrict the power of the Legislature to adopt further regulations affecting such property. It does not purport to affect existing or potential State regulation of the exercise of discretion by a real estate broker or others engaged in the business of real estate sales, mortgage financing,

title insurance, and other enterprises having to do, in whole or in part, with dealings in other people's property excepting only where such agents are acting upon the separate instructions of their principal respecting his own private residential property. It would, of course not apply to the alleged activities of suburban communities to exclude unwanted minorities through zoning, subdivision or building regulations. It does not purport to affect any of the numerous areas in which property owners among themselves or in conjunction with the State or federal government voluntarily agree to limit the exercise of their discretion in the sale or rental of their property.

In sum, the legislative policies of California have been these: Prior to 1959, the California legislature had chosen not to regulate the conduct of property owners in choosing their buyers or tenants whether or not the choice was based on race, color or creed. By the Hawkins and Unruh Acts the legislature during the period from 1959 to 1963 chose to regulate racial and religious discrimination in disposition of residential property only as practiced in "publicly assisted housing" or by persons in "business establishments of every kind whatsoever" including persons engaged in the business of selling or renting residential property, brokers, and others. From September 1963 until Section 26 became effective, the legislature, by enacting the Rumford Act, extended that regulation to cover discriminatory conduct by owners of much but not all residential property. Then in November, 1964, by enacting Section 26, the People exercised their legislative prerogative by restoring the former rule that the conduct of a private property owner in refusing to sell or rent his

property for whatever reason should not be regulated by the State but should be left to private self-determination, leaving in full force and effect the existing anti-discrimination legislation regulating activities other than that of the property owner when dealing with his own property.

That policy, being established by an amendment to the State Constitution is, of course, subject to still further repeal or modification by the People. The Court below does not suggest that the division of legislative power between the People and the representative legislature, ordained by the California Constitution (Article IV, §1, App. 8), raises any federal Constitutional question. It is settled that the reservation of legislative power to the People to be exercised through an Initiative procedure is not in itself a violation of any guaranty of the United States Constitution. *Pacific States Telph. & Teleg. Co. v. Oregon,* 223 U.S. 118; *cf., Baker v. Carr,* 369 U.S. 186. Nor is it suggested there is any federal Constitutional prohibition against the particular allocation of power made by Section 26 to the People rather than to the legislature. In *Higgins v. City of Santa Monica,* 62 Cal. 2d 24, 30, 41 Cal. Rptr. 9, 13, 396 P. 2d 41, a unanimous California Supreme Court rejected an argument that a reservation of legislative power by the People rendered a measure unconstitutional.[22] Plainly the fact that Section 26 is a

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[22]"Ordinance 703 may be repealed or amended by the legislative body having jurisdiction so to do, *i.e.*, by the people legislating directly, if it is determined to be wise or proper to open the tidelands to exploration for oil.

"The fact that accomplishment of amendment or repeal through the initiative process may be cumbersome or difficult is not the product of the alleged restriction of future discretion; it is merely

part of the California Constitution rather than an enactment of the State legislature, or for that matter, rather than a principle of law established or in the process of being established by judicial decision, is of no significance to a determination of its validity under the federal Constitution.

It is settled that a State in the exercise of its police power need not deal comprehensively with all aspects of a problem but that it may instead proceed selectively.[23] Thus, in adopting the Hawkins Act in 1959, the California legislature lawfully chose to apply regulation only to owners of housing which was "publicly assisted". The California court upheld the Act against the attack that it contravened the equal protection clauses of the State and federal Constitutions in not imposing similar regulation on owners of private housing. *Burks v. Poppy Construction Company*, 57 Cal. 2d 463, 20 Cal. Rptr. 609, 370 P. 2d 313.[24] In its unanimous opinion, the California Supreme Court said:

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a characteristic of the kind of legislative system the Constitution of this state has ordained. The significant fact is that the full legislative power of the city remains entirely unimpaired, so that it is available to permit oil development of the tidelands. The ordinance, therefore, no more limits future discretion than does any other prohibitory ordinance admittedly within a city's power to enact." *Higgins v. City of Santa Monica*, 62 Cal. 2d 24, 30.

[23]*Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483; *Tigner v. Texas*, 310 U.S. 141; *American Fed. of Labor v. American Sash & Door Co.*, 335 U.S. 538.

[24]Citing with approval the following cases to the same effect: *Levitt & Sons, Inc. v. State Div. Against Discrim., etc.*, 31 N.J. 514, 158 A. 2d 177, 186-187 [appeal dismissed for lack of federal question, 363 U.S. 418]; *New York State Com. v. Pelham Hall Apts.*, 10 Misc. 2d 334, 170 N.Y.S. 2d 750, 759-761. [In holding state had a right to legislate on a step by step basis by regulating only owners of publicly assisted housing, the court also said: ". . . The state had the right to leave abstention from racial or religious discrimination in such housing accommodations to the conscience of the individuals. . . ."]

"Discrimination based upon race or color in housing provided by the state through its branches or agencies violates the Fourteenth Amendment (*Banks v. Housing Authority*, supra, 120 Cal. App. 2d 1, 16 et seq.) and an extension of the prohibition to private housing receiving public assistance is a reasonable further step in the application of the policy against such conduct. The closer the connection of the discrimination with governmental activity, the more odious its character, and accordingly the Legislature could reasonably conclude that the problem of discrimination is more important in publicly assisted housing than in private housing which has no governmental assistance. * * *" (57 Cal. 2d at 475, 476, 20 Cal. Rptr. at 616, 370 P. 2d at 320).

Likewise, as mentioned earlier, in adopting the Rumford Act, the California legislature properly determined to impose regulation on some but not all owners of private housing and upon brokers, mortgage lenders and others dealing in the sale, rental, or financing of residential property.[25] Similarly in Oregon, the legislature chose to regulate only persons in the business of selling real property; in the 15 states having similar laws, all have taken steps short of total regulation; in 31 states, the legislatures have imposed no such regulation.[26]

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[25]This Act would apparently not apply to a publicly asissted duplex (*Cf.* subd. 1-3 with 4 of §35720 of Health & Safety Code); to some single family residences (*cf.* subd. 4 with 5 of §35720); to housing accommodations of two to four units, whether or not publicly assisted (*cf.* subd. 1-4 with 5 of §35720). (App. pp. 10-11.)

[26]See *supra*, p. 13, n. 5.

In the 1964 Federal Civil Rights Act, the legislature chose to regulate the owners of most public accomodations but not "Mrs. Murphy's Rooming House".[27]

Section 26 is exactly the same kind of legislative decision: A judgment that publicly owned housing and that brokers, financial institutions, aiders and abettors of those who discriminate in the sale or rental of most private housing shall remain regulated but that the owners of private residential property with respect to decisions not to sell or rent their own property shall not be regulated at this time. That judgment was made by a majority of more than 2,000,000 Californians. If this be a legislative abuse, as is urged by respondents, "the people must resort to the polls, not to the courts." *Munn v. Illinois*, 94 U.S. 113, 134.

Certainly the constitutionality of this particular legislative choice should not depend upon the sequence of choices California has made in the past. It should be obvious that the substance of the Fourteenth Amendment cannot be modified by adoption of local regulatory legislation, thus precluding subsequent legislative modification or repeal of the regulation. Yet the court below held that although the State had no duty to prohibit racial discrimination in housing, by once having done so by statute, it was thereafter forever barred by the Fourteenth Amendment from even a partial repeal of that statute. This has been aptly described as a "one-way lawmaking" doctrine:

> "* * * . . . a state may withdraw previously existing individual freedom to discriminate, but once that freedom has been withdrawn then the state

[27]Civil Rights Act of 1964, 78 Stat. 241, §201(b)(1).

> may not return to the earlier law. This can only be said to be a pernicious constitutional doctrine taking away from the state or federal government the right to engage in legislative policymaking in an area where there is no constitutional restriction on the state's common law policy." Williams, "*Mulkey v. Reitman* and State Action," 14 U.C.L.A. Law Rev. 26, 30-31 (Nov. 1966).

One of the unacceptable consequences of such a doctrine would be to vary the substantive content of Fourteenth Amendment rights depending upon what regulations have been imposed by the temporary incumbents of local legislative bodies throughout the nation and thus to provide the narrowest set of constitutional rights in those localities which have never tried any legislative solutions. "Our Constitution was not written to be read that way, and we will not do it." *Cf. Bell v. Maryland,* 378 U.S. 226, 318, 335 (Mr. Justice Black, dissenting).

Nothing in the federal Constitution imposes upon California the strait-jacket of perpetual conformity to a local regulatory statute which according to its highest legislature did not accomplish a net gain in promoting satisfactory human relationships.

B. Section 26 of Article I Does Not Violate the Fourteenth Amendment Because All Discriminatory Conduct It Leaves Unregulated Is Private Conduct for Which the State Cannot Fairly Be Held Responsible.

Only last term this Court reiterated the fundamental principle that the Fourteenth Amendment does not lay upon individuals and private institutions the high standards of conduct imposed upon the States:

"It is a commonplace that rights under the Equal Protection Clause itself arise only where there has been involvement of the State or of one acting under the color of its authority. The Equal Protection Clause 'does not . . . add any thing to the rights which one citizen has under the Contitution against another.' *United States v. Cruikshank,* 92 U.S. 542, 554-555. As Mr. Justice Douglas more recently put it, 'The Fourteenth Amendment protects the individual against *state action,* not against wrongs done by *individuals.*' *United States v. Williams,* 341 U.S. 70, 92 (dissenting opinion). This has been the view of the Court from the beginning. *United States v. Cruikshank, supra; United States v. Harris,* 106 U.S. 629; *Civil Rights Cases,* 109 U.S. 3; *Hodges v. United States,* 203 U.S. 1; *United States v. Powell,* 212 U.S. 564. It remains the Court's view today. See e.g., *Evans v. Newton,* ..... U.S. .....; *United States v. Price,* ..... U.S. ....."

United States v. Guest, 383 U.S. 745, 16 L. Ed. 2d 239, 247-48.

The court below, of course, explicitly avowed the principle that it is "state action" only which is within the frame of reference of the Fourteenth Amendment [R. 19]. Its judgments, however, as we shall show, are tantamount to the imposition of the high Constitutional standards of governmental conduct upon the private choices of private citizens in dealings with their own private property.

(1) Regard for Individual Freedom, the Genius of Our Federal System, and the Institutional Limitations of the Judiciary in General and This Court in Particular Compels Continued Recognition of the Fundamental Principle That "State Action" Is, and Private Action Is Not, the Proper Subject for Regulation by Constitutional Adjudication.

The recognition that "state action of a particular character" is, and "individual invasion of individual rights is not the subject matter of the amendment * * *" (*Civil Rights Cases,* 109 U.S. 3, 11), is deeply imbedded in our national life as well as in our fundamental law. As former Solicitor General Cox so eloquently said:

> "It is essential to a free, pluralistic society. It is a product of our moral philosophy, which values freedom because it calls upon man to exercise his noblest quality—the power of choice between good and evil. Freedom, in this sense, is freedom to be foolish as well as wise, to be wrong as well as right."[28]

Continuing, he said:

> "And even if that view were questioned, the philosophy of federalism leaves an area for choice to the States and their people, when the State is not otherwise involved, instead of vesting the only power of effective decision in the federal courts. Nothing in the Court's decisions or elsewhere in constitutional history suggests that the Fourteenth

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[28]Supplemental Brief of the United States as Amicus Curiae (in *Griffin v. Maryland,* 378 U.S. 130, *Barr v. Columbia,* 378 U.S. 146, *Bouie v. Columbia,* 378 U.S. 347, *Bell v. Maryland,* 378 U.S. 226, and *Robinson v. Florida,* 378 U.S. 153) at page 10.

> Amendment's prohibitions against State action put such an extraordinary responsibility upon the Court."[29]

The adoption of such expansive jurisdiction by this Court would at once undermine the separation of powers between the federal and State governments; narrow the area within which the States might endeavor to balance the conflicting claims of liberty, privacy, and equality; discourage the initiative of legislatures, local, State, and federal; and indeed undertake a function which the legislatures are infinitely better suited and equipped to handle. The problem is in part one of the ability of this Court to cope with vast numbers of cases. It is, however, equally a problem of identifying and yielding to that institution of government which is most capable of dealing with the problem in a pragmatic, equitable, and democratically responsible fashion. Where the ultimate resolution of dynamic social problems necessarily requires the constant reweighing in localized contexts of individual rights and obligations and of conflicting values of constitutional proportion, rigid constitutional mandates can only inhibit the fashioning of suitable remedies at all levels of government. See generally, *Lewis, "The Sit-in Cases: Great Expectations"*, The Supreme Court Review (1963), Univ. of Chicago Press, pp. 101, 128-29. See also Professor Freund's Owen J. Roberts Memorial Lecture, "New Vistas in Constitutional Law", 112 Univ. of Penna. L. Rev. 631, 639-644 and his statement entitled "Constitutional Bases for the Public Accommodations Bill" (*e.g.* the Civil Rights Act of 1964), Senate Report 872, 88th Cong; 2d Sess., 1964, pp. 82, 88-92; Archibald Cox, "Foreword: Constitutional

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[29] *Id.* at pp. 87-88.

Adjudication and The Promotion of Human Rights," 80 Harv. L. Rev. 91, 94, 98, 104-5, 110-111, 118-122. (Nov. 1966)

(2) The Fourteenth Amendment Does Not Require the States to Adopt or Retain or This Court to Impose Laws Prohibiting, Regulating, or Otherwise Interfering With the Discretion of the Owners of Private Residential Property in Choosing Their Tenants or Buyers.

By invalidating Section 26 the court below has held that the failure of California to provide a remedy which it once provided against racial discrimination by the owners of some private residential property violates the equal protection clause. The highest courts of other States and of certain lower federal courts have uniformly held that, to the contrary, the Fourteenth Amendment does not of its own force impose a duty upon the States to provide—or maintain—remedies against the following types of discriminatory private conduct:

1. Refusal of owner to sell or rent private residential property.[30]

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[30] *Dorsey v. Stuyvesant Town Corporation,* 299 N.Y. 512, 87 N.E. 2d 541, 547 [not unconstitutional though "Legislature deliberately refrained from imposing any restriction upon a redevelopment company in its choice of tenants."], cert. den. 339 U.S. 981; *Hackley v. Art Builders, Inc.* (D. Md.), 179 F. Supp. 851; *Jones v. Mayer* (E.D. Mo.), 255 F. Supp. 115; *Novick v. Levitt & Sons* (Sup. Ct. N.Y.), 200 Misc. 694, 108 N.Y.S. 2d 615; and *Hill v. Miller,* 64 Cal. 2d 757, 51 Cal. Rptr. 689, 413 P. 2d 852, App. 15. See also: *Bell v. Maryland,* 378 U.S. 226, 318 (dissenting opinion) and cases cited in n. 24, *supra,* p. 21.

Accord: Traynor, "Law and Social Change in a Democratic Society" (1956) Univ. of Ill. Law Forum, pp. 220, 239 [". . . He has a right to choose his friends, to determine who may come upon his property or to whom he will sell it . . ."]

2. Discrimination by real estate brokers.[31]
3. Religious discrimination by owner of apartment complex housing 35,000 residents[32]
4. Discriminatory refusal of service in places of public accommodation.[33]
5. Discrimination by employers.[34]
6. Discrimination by owner of cemetery.[35]
7. Discrimination by testators.[36]

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[31]*McKibbin v. Michigan Corporation & Securities Com'n.*, 369 Mich. 69, 119 N.W. 2d 557; *Jones v. Mayer* (E.D. Mo.), 255 F. Supp. 115.

[32]*Watchtower Bible and Tract Society v. Metropolitan Life Ins. Co.*, 297 N.Y. 339, 79 N.E. 2d 433, cert. den., 335 U.S. 886.

Accord: *Hall v. Virginia*, 335 U.S. 875, Reh. den., 335 U.S. 912, summarily dismissing the appeal in 188 Va. 72, 49 S.E. 2d 369 [conviction of trespass affirmed as against contention that statute permitting owner of 60 unit apartment to exclude Minister of Jehovah's Witness' sect from distributing religious tracts in the entrance, elevators, hallways thereof was deprivation of rights of free speech, religious freedom, etc.]

[33]*State v. Brown*, 55 Del. ...., 195 A. 2d 379 [upholding statute permitting discrimination by innkeepers in derogation of common law]; *Williams v. Howard Johnson's Restaurant* (4th Cir.), 268 F. 2d 845; *Williams v. Hot Shoppes, Inc.* (D.C. Cir.), 293 F. 2d 835; *Willaims v. Howard Johnson's Inc. of Washington* (4th Cir.), 323 F. 2d 102, cert. den. 382 U.S. 814, reh. den. 382 U.S. 933.

In the latter case, the Court of Appeals said: "[T]o accept plaintiff's proposition that the failure of the state to provide a remedy for the redress of complaints of deprivation of the equal protection of the law would be totally to emasculate existing case law. . . ." (at p. 106).

[34]*Black v. Cutter Laboratories* (Cal.), 43 Cal. 2d 788, 278 P. 2d 905, cert. den. 351 U.S. 292; *Jones v. American President Lines*, 149 Cal. App. 2d 319, 308 P. 2d 393; *cf. Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 98, concurring opinion: "Of course a State may leave abstention from such discriminations [by employers] to the conscience of individuals."

[35]*Rice v. Sioux City Memorial Park Cemetery*, 245 Iowa 147, 60 N.W. 2d 110, aff'd by equally divided court, 348 U.S. 880, vac. and cert. dism., 349 U.S. 70.

[36]*In re Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844; app. dism. and cert. den., 357 U.S. 570; *Gordon v. Gordon*, 332 Mass. 197, 124 N.E. 2d 228; *United States National Bank v. Snodgrass*, 202 Or. 530, 275 P. 2d 860; *cf. Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230.

We recognize, of course, that "significant involvement" by the State in such discriminatory conduct invokes Fourteenth Amendment responsibilities even though private choice may be the direct source of the injury. This verbal principle was employed by the court below to strike down Section 26 in misplaced reliance upon decisions of this Court involving important relationships between individual citizens and their government.

To be sure, the Fourteenth Amendment protects the right of a private citizen to participate without regard to race in the governmental machinery of an election,[37] the right of a citizen to freedom of speech on the streets of a community authorized by the State to perform exactly the same kind of functions as a publicly owned municipality,[38] the right of an association to be free from compulsory disclosure to the State of the names of its rank and file members in circumstances where the State has no legitimate interest in such information and which will deter freedom of speech and association,[39] the right of a citizen to secure without regard to his race an education from a school owned and operated by the government,[40] or to secure services,

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[37] *Smith v. Allwright*, 321 U.S. 649; *Terry v. Adams*, 345 U.S. 461; *Nixon v. Condon*, 286 U.S. 73; *Rice v. Elmore* (4th Cir.), 165 F. 2d 387, *cert. den.*, 333 U.S. 875; *Baskin v. Brown* (4th Cir.), 174 F. 2d 391; *cf. Baker v. Carr*, 369 U.S. 186.

[38] *Marsh v. Alabama*, 326 U.S. 501.

[39] *NAACP v. Alabama*, 357 U.S. 449.

[40] *Brown v. Board of Education of Topeka*, 347 U.S. 483; *Jackson v. Pasadena City School Dist.*, 59 Cal. 2d 876, 31 Cal. Rptr. 606, 382 P. 2d 878; *Branche v. Board of Education of Town of Hempstead* (D.C. N.Y.), 204 F. Supp. 150. See, *Bell v. School, City of Gary Indiana* (7th Cir.), 324 F. 2d 209, 213; *cert. den.*, 377 U.S. 924; *Downs v. Board of Education of Kansas City*, 336 F. 2d 988, 998; *cert. den.*, 380 U.S. 914.

without racial discrimination, which are owned, operated, controlled or financed by the government,[41] or the right to be free from racial discrimination by an officer or agent of the State,[42] or the right to be free from criminal prosecution for disobeying a law or command of the State that *requires* discrimination on grounds of race,[43] or the right to be free of racial discrimination in a municipal park in the maintenance and operation of which the government continued to be involved.[44] But all of these cases deal with the rights of a citizen *vis-a-vis* his government. In such relationships, the strictures of the Fourteenth Amendment are of course applicable.

Last term's decision in *Evans v. Newton* confirms the continued vitality of the principle that State involvement in private discrimination is found only where the nominally private conduct is so intertwined with gov-

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[41]*Burton v. Wilmington Parking Authority*, 365 U.S. 715; *Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877; *Holmes v. City of Atlanta*, 350 U.S. 879; *Lucy v. Adams*, 350 U.S. 1; *Board of Trustees of the University of North Carolina v. Frasier*, 350 U.S. 979; *New Orleans City Park Improvement Assn. v. Detiege*, 358 U.S. 54; *State Athletic Commission v. Dorsey*, 359 U.S. 533; *Florida ex rel. Hawkins v. Board of Control of Florida*, 350 U.S. 413; *Simkins v. Moses H. Cone Hospital* (4th Cir.), 323 F. 2d 959; *Smith v. Holiday Inns of America, Inc.* (6th Cir.), 336 F. 2d 630.

[42]*Catlette v. United States* (4th Cir.), 132 F. 2d 902; *Lynch v. United States* (5th Cir.), 189 F. 2d 476, *cert. den.*, 342 U.S. 831; *United States v. Given*, 25 Fed. Cas. 1324; *Lombard v. Louisiana*, 373 U.S. 267; *Griffin v. Maryland*, 378 U.S. 130; *Screws v. United States*, 325 U.S. 91; *Monroe v. Pape*, 365 U.S. 167; *Williams v. United States*, 341 U.S. 97; *Yick Wo v. Hopkins*, 118 U.S. 356; *Oyama v. California*, 332 U.S. 633; *Fujii v. California*, 38 Cal. 2d 718, 242 P. 2d 617.

[43]*Peterson v. Greenville*, 373 U.S. 244; *Gober v. Birmingham*, 373 U.S. 374; *Shuttlesworth v. Birmingham*, 373 U.S. 262; *Robinson v. Florida*, 378 U.S. 153; *Lombard v. Louisiana*, 373 U.S. 267.

[44]*Evans v. Newton*, 382 U.S. 296.

ernmental policy that the State can fairly be charged with responsibility for the private conduct. 382 U.S. 296, at 298, 299.

There the Court assumed, *arguendo,* that the Constitution does not prohibit the operation of parochial schools; it did not dispute the holdings in the Girard Trust cases (*Pennsylvania v. Board of Directors of City Trusts,* 353 U.S. 230, *In re Girard College Trusteeship,* 391 Pa. 434, 138 A. 2d 844, app. dism. and cert. den. 357 U.S. 570); the Court stated that "the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions" (382 U.S. at 300). The Court said that "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations" (382 U.S. at 294); in short, the Court seems to have limited its "public function" rationale (relied on in any event only to "buttress" its narrow holding) to activities, such as a park, a fire or police department that "traditionally serves the community", and to such traditional governmental functions as the government of a town as in *Marsh v. Alabama,* 326 U.S. 501, the conduct of an election as in *Terry v. Adams,* 345 U.S. 461, and the providing of public utilities under a legal monopoly granted by the State as in *Public Util. Com. v. Pollak,* 343 U.S. 451 (382 U.S. at 299).

Nothing in the majority or concurring opinions takes issue with Mr. Justice Harlan's statement of the law applicable to *private* discriminations:

> "The Equal Protection Clause reaches only discriminations that are the product of capricious state action; it does not touch discriminations whose origins and effectuation arise solely out of individual predilections, prejudices, and acts. *Civil Rights Cases,* 109 U.S. 3. So far as the Fourteenth Amendment is concerned the curtailing of private discriminatory acts, to the extent they may be forbidden at all, is a matter that is left to the States acting within the permissible range of their police power." (382 U.S. at 316, dissenting opinion).

The Court below did not discuss or resolve the vital difference between the purely private conduct which is affected by Section 26, and the public conduct in the performance of traditionally governmental functions which was crucial to the decisions it relied upon. The conduct affected by Section 26 is the refusal by private persons to deal with other private persons in the rental of their own private residential property for whatever reason or for none at all. The reason in these cases was based on racial discrimination, but it was still private conduct for which the State cannot fairly be held responsible under the Fourteenth Amendment.

The State can be said to be "responsible" for the discriminatory conduct of petitioners only in the attenuated sense that it has chosen not to exercise its coercive power at this time to regulate such conduct in the very narrow area to which Section 26 applies. Whether State "responsibility" has been fulfilled in the sense that it could but did not prohibit certain evils, is largely a question of judgment. The wisdom and necessity of legislative coercion in the field of discrimination by the owners of

private residential property in particular places and times is a question on which there "are rational arguments on either side and, quite clearly, there is room for difference of opinion here among reasonable men who share a common opposition to racial discrimination." Rice, *Bias in Housing: Toward A New Approach,* 6 Santa Clara Lawyer 162, 167-168 (Spring, 1966).][45]

Is anyone so omniscient to say with confidence that the balance struck by Section 26 is wrong? Is it absurd to believe that individual freedom of the owners of private residential property should not be subjected to governmental inquiry and sanction where other remedies now in effect and still others yet available may prove equal to the challenge? Is it plainly unreasonable to remove governmental sanctions where it is believed by an overwhelming majority of the people that nonregulation is more likely to achieve a harmonious and satisfactory solution to the housing problems of

[45]Differences of opinion on the desirability or need for this kind of legislative sanction are manifest from the House and Senate Hearings and the House debates in the eighty-ninth Congress, Second Session, concerning Title IV of the proposed Civil Rights Act of 1966 (H.R. 14765) which would have imposed federal sanctions upon racial and religious discrimination in housing. See: Material in Support of the Bill on Constitutional Grounds: Hearings Before the Subcommittee on Constitutional Rights of the Committee on Judiciary, U. S. Senate, 89th Cong., 2d Sess (1966), at 84-86; 86-88; 102-105; 122-125; 125-129; 1148-1149; 1150; 1161-1164; 1164-68; 1170 and 112 Cong. Rec. 16071-16075 (daily ed. July 25, 1966). Materials in Opposition to the Bill on Constitutional Grounds: Hearings Before the Subcommittee on Constitutional Rights of the Committee on Judiciary, U.S. Senate, 89th Cong., 2d Sess. (1966) at 60-63; 98; 118-122; 129-135; 135-139; 140-147; 384-387; 601-606; 613-614; 699-710; 837-839; 891-899; 905-910; 938-941; 1033-1037; 1069; 1071-1072; 1151; 1590-1592] 1691-1694; and 112 Cong. Rec. 16326 (daily ed. July 26, 1966); 16969-16970 (daily ed. Aug. 1, 1966); 17334-17335 (daily ed. Aug. 3, 1966); 17595 (daily ed. Aug. 5, 1966); 17912 (daily ed. Aug. 9, 1966). Material in Support of the Bill on Other

minorities than the wholesale imposition of the coercive power of government on myriads of individual citizens? Must the State, whatever the cost or whatever public opinion may be, impose total regulation on discriminatory acts of homeowners? If a State chooses to leave some areas of human conduct to the consciences of its citizens, is it fair to hold the State responsible merely because some of its citizens have no conscience?

The court below imposed constitutional responsibility upon the State for having made the legislative choice not to prohibit private conduct which it had the power, although not a duty, to proscribe [R. 41]. The logical result of this far-reaching proposition is that virtually *all* conduct is brought within the Fourteenth Amendment and subject to appraisal on Constitutional standards by this Court. Such a holding neither is nor should be the law.

Grounds: Hearings Before the Subcommitte on Constitutional Rights of the Committee on Judiciary, U.S. Senate, 89th Cong., 2d Sess. (1966), at 82-84, 86; 362-384; 1392-1396; 1401-1428; and 112 Cong. Reg. 16075-16076 (daily ed. July 25, 1966); 17595 (daily ed. Aug. 5, 1966). Material in Opposition to the Bill on Other Grounds: Hearings Before the Subcommittee on Constitutional Rights of the Committee on Judiciary, U.S. Senate, 89th Cong., 2d Sess. (1966), at 282-294; 349-357; 388-389; 849-850; 869; 873; 1063-1067; 1091-1094; 1108-1109; 1149; 1156-1160; 1177-1178; 1502-1507; and 112 Cong. Rec. 16318 (daily ed. July 26, 1966); 16319 (daily ed. July 26, 1966); 16320 (daily ed. July 26, 1966); 16419-16420 (daily ed. July 27 1966); 16719-16721 (daily ed. July 28, 1966); 16741-16742 (daily ed. July 28, 1966); 17340 (daily ed. Aug. 3, 1966); 17594 (daily ed. Aug. 5, 1966). Material in Support of State Fair Housing Laws: 112 Cong. Rec. 1347-1351 (daily ed. Jan. 28, 1966); 1351-1359 (daily ed. Jan. 28, 1966). Material in Opposition to State Fair Housing Laws: Hearings Before the Subcommittee on Constitutional Rights of the Committee on Judiciary, U.S. Senate, 89th Cong., 2d Sess. (1966), at 854; 822; 918-921; 923-928; 944-961; 1073-1074; 1082-1083.

Can there be any doubt that a state has the power to prohibit racial discrimination in the operation of a private school? an employment agency? the practice of medicine? or law? an eating establishment even though it is called a private club and requires payment of dues? to declare unlawful any testamentary disposition of property conditioned upon race or religion? or to prohibit any and all arbitrary or unreasonable conduct which causes any harm to others? Indeed, cannot the State, under its broad police powers, establish reasonable prohibitions or requirements concerning practically all conduct excepting only such private conduct as is itself protected by the Constitution?

The necessary corollary of the decisions below is that the State *must* regulate all conduct which it *may* regulate or run afoul of the Fourteenth Amendment. Such a rule would denude the States completely of all discretion to decide whether or not regulation is desirable or necessary under the varying circumstances in each State and constitute an outright cession to this Court of all power and duty to make or veto all of such decisions.[46] The result would be a status of all-pervasive, total regulation. Total regulation, not by Congress, not by a State or local legislature, not by any

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[46]See the analysis of this thesis by Professor Lucas in 13 Buffalo L. Rev. 443-449; by Professor Lewis in "The Sit-in Cases: Great Expectations," The Supreme Court Review (1963) Univ. of Chi. Press. pp. 101 at 114-116 and his paper "The Meaning of State Action," 60 Col. L. Rev. 1083, and by Professor, then Solicitor General Cox, quoted *supra*, p. 25 and *infra*, p. 61. See also, *Kauper, Civil Liberties and the Constitution*, Univ. of Mich. Press (1962) at page 137: "The point here stressed, however, is that the power of the state to [adopt legislation prohibiting racial or religious discrimination in various activities] is a discretionary power and is not to be confused with a *duty* imposed by the Fourteenth Amendment to enact this kind of legislation."

State court, but total regulation solely by one, albeit our highest, Court. Such a result is contrary to our Constitutional plan, unsound in principle, and inconsistent with this Court's decisions from the beginning.

(3) By Its Legislative Determination Not to Impose Governmental Sanctions Upon Private Persons in Choosing the Persons to Whom They Will Dispose of Their Own Residential Property for Whatever Reason Their Consciences Dictate, California Did Not "Authorize" or "Encourage" or Become "Significantly Involved" in Private Conduct Based Upon Race, Religion, or Any Other Arbitrary Ground.

The court below held that California was responsible under the Fourteenth Amendment for the purely private racially discriminatory conduct of Mr. Reitman and Mr. Snyder. Such responsibility was fixed solely because in adopting Section 26 the people of California had "nullified" previously enacted legislation prohibiting such conduct and "forestalled" such legislation in the future except by further vote of the people[47] [R. 18-19].

It was this sequence of legislative activity alone that the court below ultimately relied upon in concluding that the State so "permits", "encourages", "authorizes", and is so "significantly involved in" private discriminatory conduct as to be responsible for it under the Fourteenth Amendment. The quoted words were imported from decisions of this Court rendered in cases

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[47]As previously noted, *supra*, p. 2 in *Prendergast*, the Court also held, relying upon *Shelley v. Kraemer*, 334 U.S. 1, that judicial recognition of the rights here asserted by the property owners against Negro tenants would violate the Fourteenth Amendment even if Section 26 were itself valid. This proposition is discussed under point II hereof, *infra*, p. 48 *et seq.*

involving conduct in the performance of inherently public or governmental functions, such as the conduct of primary elections, the exercise of municipal power by a town, or the operation of a municipal park in which there had been no change in "municipal maintenance and concern" and whose "predominant character and purpose" was municipal (*supra,* p. 30). To apply such decisions to the private conduct of private persons in the disposition of their private residential property is to make utter nonsense of many decades of jurisprudence establishing the fundamental distinction between private and "state" action.

More specifically, the holdings below rest upon the following wholly inaccurate comparisons of the facts of the cases at bar with the subject matter of prior decisions of this Court:[48]

> (a) The conduct of the private owners of residential property is equated with the conduct of institutions engaged in providing services to the public on governmentally owned property and with substantial participation of the government, financial and otherwise, such as was involved in *Burton v. Wilmington Parking Authority,* 365 U.S. 715; and *Turner v. City of Memphis,* 369 U.S. 350; *cf. Evans v. Newton,* 382 U.S. 296 [R. 24-28].

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[48]The conflict of the decisions below with prior decisions of this Court is analyzed in the following commentaries: Williams, "*Mulkey v. Reitman* and State Action", 14 U.C.L.A. L. Rev. 26; Horowitz and Karst, "The Proposition Fourteen Cases: Justice in Search of a Justification," 14 U.C.L.A. L. Rev. 37; Donnici, "State Responsibility for Residential Racial Discrimination: The Decline and Fall of California's Proposition 14," 1 Univ. of S. Fran. L. Rev. 12; Note, "The Unconstitutionality of Proposition 14: An Extension of Prohibited 'State Action'", 19 Stan. L. Rev. 232. "Editors' Case Note; State Encouraged Discrimination: *Mulkey v. Reitman* (Cal. 1966)," 6 Santa Clara Lawyer 241 (Spring, 1966).

(b) The private conduct of petitioners in choosing tenants of their own residential property is equated with the joint conduct of the arresting officer, prosecutor, court, jury, and jailer in Chickasaw, Alabama, the company-owned town authorized by the State to exercise all the governmental powers of a public municipality. *Marsh v. Alabama,* 326 U.S. 501 [R. 23].

(c) The private conduct of petitioners is equated with the conduct of the elaborate electoral institutions which in combination with State officials caused all Negroes to be systematically excluded from all participation in the only meaningful elections in certain southern States. *Smith v. Allwright,* 321 U.S. 649; *Terry v. Adams,* 345 U.S. 461; *Nixon v. Condon,* 286 U.S. 73, see also *Anderson v. Martin,* 375 U.S. 399 [R. 23-24].

Contrary to the situation in the cases relied upon by the court below, petitioners here are not performing any function at all except making a private selection of whom they desire as tenants in their own private residential property. That decision is a personal and independent judgment which has not been forced upon them directly or indirectly by the government. Their relationship as property owners with the government is the same as that between all property owners and the government. While they are not penalized for making an arbitrary choice, neither are they rewarded for making a choice be it arbitrary or rational. In no way can it be said that these owners of private residential property have been delegated any power which is even remotely akin to the power to govern a community or to control the governmental electoral processes, nor is their

conduct in deciding to terminate a tenancy on grounds of race remotely comparable to the arrest and conviction of a "trespasser" in places of public accommodations or to the deprivation on racial grounds of the right of a citizen to participate in the process of enacting public laws and electing public officials.

Demonstrably, the court below did not find that Section 26 in fact encourages or authorizes racial discrimination. *Mulkey* could not have been decided on that ground because there the discriminatory conduct occurred in 1963 before Section 26 was proposed or adopted [R. 3]. More significantly, had the court found Section 26 to have actually encouraged or authorized discrimination it could not concurrently have decided *Hill v. Miller,* 64 Cal. 2d 757, 51 Cal. Rptr. 689, 413 P. 2d 852, App. 15, as it did—permitting the landlord to prevail where he expressly relied on what he asserted was the "right" given him by Section 26 to refuse to rent to Negroes (App. 16). The California Court necessarily held that the State was free to adopt and maintain a common law rule which did not prohibit racial discrimination by the owner of private property (*Hill v. Miller*), but that it was unconstitutional for the State to restore such a common law rule once it had been abrogated however temporarily by statute (*Mulkey v. Reitman* and *Prendergast v. Snyder*). In other words, it was the partial repeal of pre-existing anti-discrimination statutes that the California Court found to constitute unconstitutional State involvement in and authorization and encouragement of racial discrimination.

As further rationalization of its decisions, the court below sought to equate Section 26 with the statutes in *Robinson v. Florida,* 378 U.S. 153; *Evans v. Newton,*

382 U.S. 296 (as construed in the concurring opinion of Mr. Justice White), and *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (as construed in the concurring opinion of Mr. Justice Stewart) [R. 24-28]. The vices of those statutes were, respectively, the imposition of a greater burden upon one who chose not to discriminate in the operation of a restaurant,[49] the legalization of discrimination on grounds of race but on no other grounds in the establishment of public trusts,[50] and the classification on racial grounds of the right of access to public accommodations.[51]

Section 26 applies to all property owners. It in no way burdens those who do not discriminate. It neither condemns nor authorizes any basis of decision by a property owner with respect to the choice of persons with whom he will deal. It certainly does not single out and favor racial as opposed to other forms of discrimination.

In *Burton*, eight of the justices treated the Delaware statute as reflecting the common law that a private restaurant operator could refuse service to anyone for any reason or for none (365 U.S. 715, 721, 727, 730). That is the plain effect of Section 26: It reestablishes the common law rule that was in effect until 1959 when California adopted the first of its statutes prohibiting racial and religious discrimination in housing.

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[49] *Robinson v. Florida*, 378 U.S. at p. 156. In that case this Court relied upon *Peterson v. Greenville*, 373 U.S. 244, where the city ordinance compelled racial discrimination by private restaurant owners.

[50] *Evans v. Newton*, concurring opinion of Mr. Justice White, 382 U.S. 296, at p. 303.

[51] *Burton v. Wilmington Parking Authority*, concurring opinion of Mr. Justice Stewart, 365 U.S. at p. 726. See *Lewis*, "The Sit-in Cases: Great Expectations", The Supreme Court Review (1963), Univ. of Chi. Press, p. 145, n. 100.

Respondents seek to justify the decisions below by asserting an additional equation (not accepted by the court below) that the conduct of petitioners in the context of widespread private racial discrimination in residential housing is the legal equivalent of a racial zoning ordinance.[52] That asserted parallel is based upon a factual premise that is not supported by the record or by the findings of the court below, one that is subject to grave doubt in light of the overwhelming public policy opposing racial discrimination, the comprehensive regulations prohibiting racial discrimination by persons engaged in the business of dealing in other people's residential property, and the mounting tide of public opinion opposed to racial discrimination in housing and elsewhere.

In any event, it would not follow that the sole or even a substantial cause of minority neighborhoods is the personal prejudice of white property owners. Personal preference, habit, poverty, ignorance, an inadequate supply of moderately priced accommodations, and a complex array of sociological and economic factors have brought about racial separation in residential housing. Nor is there reliable evidence that prohibition by law of private discrimination would necessarily or even probably, either alone or in combination with other governmental programs, make a substantial contribution to integrated housing.[53]

The complexity of these problems of cause and effect is in itself proof that the manner in which and

[52]Brief in Opp. to Pet. for Cert., p. 15, n. 16.

[53]See the materials cited in n. 45, *supra* p. 34. Much of the literature on this subject (see Br. in Opp. to Pet. for Cert. p. 5, n. 7) appears to be authored by strong advocates of comprehensive governmental assistance to housing and governmental

the time at which any particular phase of the problem shall be attacked by the government, the choice as to which causes are the more pressing for solution, and the balancing of the evil to be cured against the harm of any particular regulation are matters for legislative judgment. See *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 400; *American Fed. of Labor v. American Sash & Door Co.,* 335 U.S. 538, 542.

In arguing that Section 5 of the Fourteenth Amendment empowers Congress to prohibit discrimination in housing, Professor Cox says:

> "* * * Under *Guest* a conspiracy to deter Negroes, by violence and threats of violence, from buying property anywhere in a community would be a proper subject of federal cognizance because it would defeat the practical enjoyment of the legal right, even though the right survives conceptually. Surely the case is the same if the whole community, by express conspiracy or unspoken custom, refuses to sell any property to Negroes; the scope of power of Congress does not depend upon whether it is forbidding aggressive acts or imposing affirmative duties. One's impression is quite different if he thinks of a single refusal and unconsciously assumes that ample property of every description is otherwise available, for in that event to speak of diminution of the civil right to buy and sell seems artificial.

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regulations of all conduct thought to contribute to inadequate housing or to delay the creation of integrated neighborhoods. That the causes of segregated housing and the creation of adequate housing opportunities for minority groups and others are enormously complex problems (and that causes and cures are primarily economic) is evidenced by Report on Housing in California. Governor's Advisory Commission on Housing Problems, Calif. State Printing Office, January, 1963.

> The truth doubtless varies from one community to another and often lies between the two extremes; but, under *Katzenbach v. Morgan,* finding the facts and appraising their significance is exclusively a legislative function. * * *" ("Foreword; Constitutional Adjudication and the Promotion of Human Rights," 80 Harv. L. Rev. 91, 118, Nov. 1966)

The debate continues in California and elsewhere (*supra,* pp. 13-23) as to the need or desirability of fair housing laws and to what remedies should be afforded and as against whom in this field. As Mr. Justice Frankfurter said:

> "Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic government. Most laws dealing with economic and social problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophecy in actual operation. It may not prove good, but it may prove innocuous. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests—the people. If the proponents of union-security agreements have confidence in the arguments addressed to the Court in their "economic brief," they should address those arguments to the electorate. Its endorsement would be a vindication that the mandate of this Court could never give."

(Concurring in *American Fed. of Labor v. American Sash & Door Co.*, 335 U.S. 538, 553, footnote omitted.)

Regardless of whether respondents' argument should more properly be addressed to the legislature, their effort to liken Section 26 to State delegation of the governmental function of zoning because of the alleged similarity of result (*e.g.*, "*de facto* zoning") is plainly specious.[54] If all the citizens of Chickasaw, Alabama, had independently refused at their doorsteps to accept or read the proferred religious literature, the effect on Mrs. Marsh's purpose in communicating her religious views would have been equally devastating, but it does not follow that Alabama would therefore be held responsible. In *Marsh v. Alabama*, 326 U.S. 501, the State was responsible because the power of government was brought to bear by the arrest and conviction of Mrs. Marsh for refusing to leave a public sidewalk which had been dedicated to public use by an instrumentality having all the powers delegated by the State to all municipal governments.

The principle of *Marsh* has been held not to extend to private control of the interior of a housing project of 35,000 tenants by the owners, *Watchtower Bible & Tract Society v. Metropolitan Life Ins. Co.* (N.Y.), 69 N.E. 2d 433, cert. den. 335 U.S. 886, and to a privately owned, publicly financed, housing development of 25,000 capacity alleged to discriminate on racial grounds, *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E. 2d 541, cert. den. 339 U.S. 981. See also *Hall v. Virginia*, 335 U.S. 875, reh. den. 335 U.S. 912, dismissing the appeal in 188 Va. 72, 49 S.E. 2d 369.

[54] Br. in Opp. to Pet. for Cert., p. 15, n. 16.

The Constitutionally relevant characteristics of discriminatory zoning ordinances are notably the imposition of compulsory regulations by the government itself, the imposition of coercive sanctions on nonconsenting owners and prospective owners of real property, and applicability to large areas over an indeterminate period of time. Even concerted action by private persons cannot have an impact comparable to the coercive power of government. Moreover, concerted action by a group of property owners to discriminate on racial grounds in the sale or rental of housing in their neighborhood may be already prohibited by a portion of the Rumford Act unaffected by Section 26, which relates only to the individual decision of a property owner in disposing of his own property (App. 10).

The conduct left unregulated by Section 26 bears none of the attributes of either governmental functions or concerted private activity. The conduct here involved is that of a private person made in the disposition of his own property. It is individual conduct and not conduct in concert with others. It is conduct which relates only to the actor's own property at a time when he is still the owner and not conduct which is sought to be imposed on unwilling transferees either indefinitely or over a period of years. It is conduct relating exclusively to the decision of one citizen not to dispose of his own property to another citizen, uninfluenced by any governmental reward or penalty. It is a decision in which the government does not participate. It is certainly conduct which is not required by the State to be based on

arbitrary grounds. It is conduct in the performance of a function which free men have long considered to be their privilege in the absence of valid legislation under the police power, a function which never has been viewed and cannot be truly classified as governmental in character.

These are the controlling factors in determining the Constitutionality of Section 26. This Court teaches that Fourteenth Amendment duties are imposed upon a private agency to which the State has delegated directly or indirectly extraordinary powers to perform a function which bears a close relationship to sovereignty—such as voting, municipal government, or zoning and its incidents of concerted action, sanctions, and binding effects on nonconsenting property owners over a period of years. To apply those teachings to the conduct of a private property owner in the performance of the private function of choosing a buyer or tenant of his own property is to make a mockery *first,* of this Court's painstaking emphasis on the truly governmental character of the private agencies involved in the voting, company town and restrictive covenant cases and of the function they were empowered to perform by the State, and *second* of the repeated admonitions of the Court that the Fourteenth Amendment does not reach purely private conduct.

II.

NEITHER SHELLEY V. KRAEMER NOR THE EQUAL PROTECTION CLAUSE REQUIRES STATE COURTS TO REFUSE TO RECOGNIZE OR ENFORCE RIGHTS SOLELY BECAUSE THE LITIGANT'S MOTIVATION IN ACQUIRING OR ASSERTING THEM WAS AFFECTED BY HIS RACIAL DISCRIMINATION.

In *Prendergast*, the California Court, relying on *Shelley*, held that a State court would violate the equal protection clause merely by entertaining or ruling on a defendant's plea for declaratory relief with respect to the validity of his private termination of a lease of his private property and of his right to possession of that property if the termination had been based upon the racial prejudice of the defendant.[55]

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[55]The California Supreme Court expressly adopted the reasons relied upon by the trial court as an independent ground of its decision that the equal protection clause forbade judicial recognition of the landlord's termination of a tenancy at will where the landlord's action was based upon the fact that his tenant was a Negro [R. 76, 83-84]. The trial court had held the decision of the California District Court of Appeals in *Abstract Investment Co. v. Hutchinson*, 204 Cal. App. 2d 242, 22 Cal. Rptr. 309, was determinative of the case, whether or not it was sound. *Prendergast v. Hill* (L. A. Sup. Ct.), R. 71, 74, 76.

In *Abstract*, the court had held, on the basis of its expansive interpretation of *Shelley v. Kraemer* and *Barrows v. Jackson*, that it was "reversible error to exclude evidence that the plaintiff landlord in an eviction proceeding was motivated purely by racial considerations, although the defendant tenant was admittedly in default." [R. 22]. The reason given for the holding was that the defense of discrimination "if proven would bar the court from ordering his eviction because such 'state action' would have been violative of both the federal and state Constitutions." *Abstract Investment Co. v. Hutchinson*, 204 Cal. App. 2d 242, 255, 22 Cal. Rptr. 309, 317.

Section 26 had of course amended the State Constitution by the time of the judgment of the trial court in *Prendergast*. Therefore, *Abstract* could be deemed controlling only on the theory that *Shelley* established that the equal protection clause precluded recognition by a State court of rights asserted by a

This extreme interpretation of *Shelley* is unsupported by any decision of this Court and has been suggested by the courts of but one other State [56] in the eighteen years since *Shelley* was decided here. It is demonstrably in conflict with the Pennsylvania Supreme Court in the Second *Girard Trust* Case, in which this Court dismissed the appeal and denied certiorari.[57] It is equally

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party motivated by racial prejudice, however valid the rights might otherwise be.

[56] *State v. Brown*, 55 Del. ...., 195 A. 2d 379.

[57] *In re Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844, app. dism. and cert. den. 357 U.S. 570.

In that case, the Pennsylvania Supreme Court held that the removal of public and the substitution of private trustees in order to carry out the limitation in Stephen Girard's will of a school for poor, white, male orphans was not a violation of the Fourteenth Amendment. Despite substantial governmental involvement, including numerous acts of the State legislature and many city ordinances enacted to enable, encourage and facilitate the effectuation of the will, many years of continuous management by public trustees prior to the substitution of private trustees, and city decrees admitting a will to probate and substituting public for private trustees (see generally dissenting opinions, *In re Girard's Estate*, 386 Pa. 548, 127 A. 2d 287 at 318, and *In re Girard College Trusteeship*, 391 Pa. 434, 138 A. 2d 844 at 854), this Court dismissed the appeal from that decision without any suggestion that the dismissal was not on the merits. (Also, treating the papers as a petition for certiorari, it denied the writ.) 357 U.S. 570.

Inexplicably, the opinions of the Court below do not discuss the Second *Girard Trust* Case or the other wills cases (*e.g.*, *Gordon v. Gordon* (Mass. 1955), 124 N.E. 2d 228, 235 [court decree enforcing provision in a will that an heir's interest would be cut off if he married a person not of the Jewish faith and awarding property to the complainant held not in violation of State law or of the Fourteenth Amendment]; *U. S. National Bank v. Snodgrass* (Or. 1954), 275 P. 2d 860-866.) Those cases cannot lightly be ignored in evaluating the constitutionality of private discrimination in inter vivos transfers. Mere reference to a constitutional "right to *acquire* and *possess* property of every kind" [see R. 19] and casual allusion to the statutory origin of testamentary law in general will not suffice.

The asserted constitutional right to acquire property is balanced by a constitutional right of equal priority to "enjoy, own, and dispose of property." Likewise, the right to *dispose* of property by will is as much the creature of the legislature as is the right to *acquire* property by will. If then discrimination by testamentary

in conflict with decisions of other State and federal courts.[58] It is also irreconcilable with the method of analysis established by this Court in articulating its decisions in the numerous equal protection cases since *Shelley*. Many of those cases, including the sit-in cases of recent years and *Evans v. Newton*[59], could have been handled summarily by citation of *Shelley* if that case in fact held that judicial recognition of rights whose acquisition or assertion was motivated by racial prejudice would — without more — constitute unconstitutional State action.

This Court has never embraced such a simplistic construction of *Shelley*. It has, to the contrary, steadfastly and carefully focused on and defined the critical issue

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act (at least where free from the taint of conspiracy or governmental influence) is beyond the regulatory ambit of Section 1 of the Fourteenth Amendment even though that act can never take effect without both legislative and judicial action—and this much even our opponents have conceded throughout these proceedings—by what alchemy can a person's private and solitary decision not to sell or rent his own real property to a Negro, a decision which can often though not always be given effect without the slightest act of court or other state instrumentality, be transmuted into "state action"? The short answer is that the wills cases, if correct, ineluctably require reversal of the court below in these cases.

Obviously the right to dispose of property does not encompass an obligation of the State to produce a willing buyer. So too, the right to acquire property does not involve any obligation of the State to produce a willing seller. The State *may* prohibit transactions if the motives are ignoble and injurious—but nothing in the Fourteenth Amendment *requires* the State to do so.

[58]See *Rice v. Sioux City Memorial Park Cemetery*, 245 Iowa 147, 60 N.W. 2d 110, aff'd, 348 U.S. 880, vacated and cert. dismissed, 349 U.S. 70; *McKibbon v. Michigan Corp. & Sec. Comm'n*, 369 Mich. 69, 119 N.W. 2d 557; *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E. 2d 541, cert. denied, 339 U.S. 981; *Williams v. Howard Johnson's Inc.* (4th Cir.), 323 F. 2d 102, cert. den., 382 U.S. 814, Reh. den., 282 U.S. 933; *Williams v. Howard Johnson's Restaurant* (4th Cir.), 268 F. 2d 845.

[59]382 U.S. 296.

thusly: Can the state fairly be charged with the responsibility for the discrimination in acquiring or asserting the right?[60] If not, the discrimination is private. Surely subsequent judicial recognition of the validity of private rights cannot, standing alone, fairly be held to render the state responsible for the discriminatory acts or motives out of which they arose.[61]

The restrictive covenant cases are distinguishable from the cases here at issue in important respects. There, the Court was asked to compel discrimination by enjoining or burdening a transaction between willing parties, whereas, in the cases below, plaintiffs sought to force themselves on unwilling lessors. The court below wholly ignored this vital distinction and read the equal protection clause far more broadly than did six members of this Court in *Bell v. Maryland*, 378

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[60]As Mr. Justice Harlan expressed it in his concurring opinion in *Peterson v. Greenville*, 373 U.S. 248 at p. 249: "* * * Judicial enforcement is of course state action, but this is not the end of the inquiry. The ultimate substantive question is whether there has been 'State action of a particular character' (Civil Rights Cases, *supra* (109 U.S. at 11)—whether the character of the State's involvement in an arbitrary discrimination is such that it should be held *responsible* for the discrimination."

[61]Such a far-reaching interpretation of *Shelley* has been rejected by all but a few of a host of learned commentators. The principal articles are: Lewis, *The Meaning of State Action* (1960), 60 Col. L. Rev. 1083; Lewis, *The Sit-in Cases: Great Expectations*. The Supreme Court Review (1963), University of Chicago Press, particularly at pp. 114-119; Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959); Van Alstyne and Karst, *State Action*, 14 Stanford L. Rev. 3 (1961) (especially *Case* 17 at p. 50); Kauper, *Civil Liberties and the Constitution*, Chapter IV; pp. 127, 166, University of Michigan Press (1962); Pollak, *Racial Discrimination and Judicial Integrity; A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1 (1959); St. Antoine, *Color Blindness but not Myopia; A New Look at State Action, Equal Protection, and "Private" Racial Discrimination*, 59 Mich. L. Rev. 993 (1961) (especially pp. 1003-1016); Henkin, *Shelley v. Kraemer; Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473 (1962); Williams, *The Twilight of State Action*, 41 Tex. L. Rev. 347 (1963).

U.S. 226. There, Mr. Justice Goldberg, joined by the Chief Justice and Mr. Justice Douglas, clearly, if by implication, limited the reach of that clause to matters public when he observed at page 313:

> ". . . Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.
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> "We deal here, however, with a claim of equal access to public accommodations. This is not a claim which significantly impinges upon personal associational interests; nor is it a claim infringing upon the control of private property not dedicated to public use. . . ."[62]

Mr. Justice Black, dissenting for himself and Mr. Justice Harlan and Mr. Justice White, made the limitation express when he declared at page 331:

> "This means that the property owner may, in the absence of a valid statute forbidding it, sell his property to whom he pleases and admit to that property whom he will; so long as both parties are

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[62]In a separate concurring opinion for himself and Mr. Justice Goldberg, Mr. Justice Douglas similarly observed at p. 253: "The problem with which we deal has no relation to opening or closing the door of one's home. The home of course is the essence of privacy, in no way dedicated to public use, in no way extending an invitation to the public. Some businesses, like the classical country store where the owner lives overhead or in the rear, make the store an extension, so to speak, of the home. But such is not this case. The facts of these sit-in cases have little resemblance to any institution of property which we customarily associate with privacy."

willing parties, then the principles stated in *Buchanan* and *Shelley* protect this right. But equally, *when one party is unwilling, as when the property owner chooses not to sell to a particular person or* not *to admit that person, then, as this Court emphasized in Buchanan, he is entitled to rely on the guarantee of due process of law, that is, 'law of the land', to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant to some constitutional grant of power, can anyone disturb this free use.*" (Emphasis added).

The restrictive covenant cases are further distinguishable in that judicial action forcing willing sellers to discriminate against their wills in the restrictive covenant cases would have had the same characteristics as racial zoning ordinances because of the pervasiveness of such agreements, their duration, their intended applicability to successive non-consenting transferees, and the governmentally imposed sanctions for their breach. The restrictive covenants were held unenforceable for the same reason discriminatory zoning was invalidated, namely, they "annulled the civil right of a white man to dispose of his property if he saw fit to do so to a person of color, and of a colored person to make such disposition to a white person." *Buchanan v. Warley*, 245 U.S. 60, 81. That rationale is plainly inapplicable to these cases where unwilling lessors are involved. It is likewise inapplicable to Section 26, which has none of the characteristics of a racial zoning ordinance, none of the features of a court-enforced system of restrictive covenants, and leaves strictly to the private decision of each property owner the choice of his buyer or tenant (*supra*, p. 17).

A. Shelley v. Kraemer Goes No Further Than Precluding State Courts From Bringing the Coercive Power of the State to Bear to Coerce or Induce Racial Discrimination by Compelling a Person to so Discriminate or by According More Favorable Treatment to a Racially Discriminatory Decision Than to a Nondiscriminatory One.

Broadly construed, *Shelley* stands for the principle that the states cannot constitutionally bring their judicial power to bear to induce discrimination — *i.e.*, to compel a discriminatory decision by a person who would otherwise make a nondiscriminatory c[illegible] or to punish a nondiscriminatory decision. Such a principle is inapplicable to disputes between the primary parties to a transaction, as Buyer v. Seller, or Lessee v. Lessor. It gives no man a right to compel others to deal with him without racial or other discrimination in private affairs.[63] Nor does it prevent judicial recognition of legal rights which a party might have elected to waive but for his distaste for the color of the other's skin. A debt past due is collectible, a mortgage unpaid is foreclosable, a tenancy at will is terminable even though the action might not have been instituted had the party been dealing with one of his own race or religion or with a member of the same fraternal or social organization or with a close personal friend. What *Shelley* and the equal pro-

[63]See Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1, 13 (1964): "[T]he Fourteenth Amendment permits each his personal prejudices and guarantees him free speech and press and worship, together with a degree of free economic enterprises, as instruments with which to persuade others to adopt his prejudices; but access to state aid to induce others to conform is barred." The petitioners here are not seeking court aid "to induce others" to practice racial discrimination.

tection clause require is that the State refrain from inducing racial discrimination that would not otherwise occur by bringing its power to bear — on its own motion or at the behest of an outsider to the transaction— to deprive a man, because of his race, of a bargain or benefit another is willing to confer upon him, or to punish a man for making a non-discriminatory decision.[64]

B. Judicial Recognition and Enforcement of Legal Rights Should Not, Even in Matters Involving Racial Discrimination, Turn Upon Such Superficial Criteria as the Position of the Parties or Their Election Among Available Types of Pleadings.

By invoking *Shelley* in support of its decision against the cross-complaining lessor in *Prendergast* while at the same time affirming the judgment in favor of the demurring landlord in *Hill v. Miller*, 64 Cal. 2d 757, 51 Cal. Rptr. 689, 415 P. 2d 33, App. 15, the California Supreme Court appears to have attributed substantial, possibly dispositive, significance to the defendant's election among available procedural formalities. That it did so is further indicated by the "affirmative relief" language of the *Prendergast* trial court [R. 74], whose reasons for decision were adopted by the

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[64]Still further limitations may be required in circumstances where other valued interests are involved. For example, absent state law to the contrary, a trustee or executor administering a trust or estate with discriminatory provisions, though in a sense an "outsider to the transaction", should probably not only be free to follow those provisions if he chooses; he probably should be subject to judicial coercion to follow them or at least subject to removal by judicial action if necessary, if he refuses. See Wechsler, "The Nature of Judicial Reasoning, Part II, C, p. 295. *Law and Philosophy*, N.Y. Univ. Press. 1964.

California Supreme Court [R. 83-84]. Still further indication is given by the failure of the court below to rely upon its *Shelley* theory as an independent ground of decision in *Mulkey v. Reitman* [R. 14]. Indeed in *Mulkey* (an appeal from a judgment entered on defendant's motion for judgment on the pleadings), the California Supreme Court observed before reaching the basis for its decision:

> "*Shelley,* and the cases which follow it, stand for the proposition that when one who seeks to discriminate solicits and obtains the aid of the court in the accomplishment of that discrimination, significant state action, within the proscription of the equal protection clause, is involved. The instant case may be distinguished from the *Shelley* and the *Abstract* [*Development Co. v. Hutchinson,* 204 Cal. Rptr. 309], cases only in that those who would discriminate here are not *seeking* the aid of the court to that end. Instead they are in court only because they have been summoned there by those against whom they seek to discriminate. The court is not asked to enforce a covenant nor to eject a tenant, but only to render judgment denying the relief sought in accordance with the law of the state. * * *" [R. 22-23].

The court below intimates in its *Mulkey* opinion that the distinction had no significance, but in *Prendergast* [R. 83-84] and *Hill v. Miller* [R. 18] it held the distinction was dispositive. Professors Horowitz and Karst characterize these results:

> "* * * In both cases the plaintiffs sought to restrain evictions, at the end of their tenancies, alleging that the defendant landlords sought to evict

solely because the plaintiffs were Negroes. In *Prendergast* the landlord cross-complained for a declaratory judgment that he was entitled to possession of the premises. * * * In *Hill* the defendant did not cross-complain for relief; he merely demurred to the plaintiff's complaint for an injunction to restrain the eviction. And the court said that plaintiff's reliance upon *Abstract* is misplaced. In that case it was held that to make available to a discriminating landlord the aid and processes of a court in effecting a discrimination would involve the state in action prohibited by the Fourteenth Amendment.'

"In both cases the landlord contended that he was permitted under California law to use race as a standard in determining to whom he would rent his property. With respect to the argument based on *Abstract,* the court responded that if the landlord wished to rely on that principle of California law the courts (a) could constitutionally apply the principle in his favor if he defended a suit brought by the tenant, but (b) could not constitutionally apply the principle in the landlord's favor if he were seeking judicial relief, as was the plaintiff in *Abstract* and the cross-complaining defendant in *Prendergast.* The court apparently concluded that there was a constitutional distinction in the degree of state involvement in private acts of racial discrimination between the situation where a plaintiff landlord is awarded a judgment that he is entitled to the premises and the situation where a defendant landlord is awarded a judgment that the tenant is not entitled to the premises—a distinction which

the court in the principal decision, *Mulkey,* stated to be without significance. The constitutional issue, of course, is the validity of the principle of state law permitting private acts of racial discrimination in housing; the approach of the court to the *Abstract* issue in *Prendergast* and *Hill* misses the point." Horowitz and Karst, "The Proposition Fourteen Cases: Justice in Search of a Justification," 14 U.C.L.A., L. Rev. 37, 44-45, n. 26.

We submit that Constitutional principles ought not to stand or fall on such procedural niceties as a defendant's election between a demurrer and a cross-complaint seeking a declaration that the plaintiff does not have the right which he asserts and upon which he bases his claim for relief. *Shelley v. Kraemer* does not require such a result. An enlightened concern for the substance of Constitutional rights can hardly tolerate it.

C. Because California Has by Statute Outlawed All Means by Which a Landlord May Recover Possession of Property Wrongfully Occupied by a Tenant Except an Action in Unlawful Detainer, Petitioner Snyder Will Be Deprived of His Property Without Due Process and the Equal Protection of the Unlawful Detainer Law if the Courts Refuse to Recognize and Enforce His Termination of the Month-to-Month Tenancy of the Prendergasts.

In California, a lessor of real property with the right to possession can lawfully recover possession from a tenant in actual though wrongful occupation only by an action in unlawful detainer.[65] Without the consent

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[65]California Code of Civil Procedure, Section 1161, *et seq.*

of the person in wrongful occupation, self-help is punishable as forcible entry and/or detainer.[66] If California courts refuse to recognize petitioner's termination of tenancies-at-will granted on their property, Mr. Snyder will be deprived of the only lawful means of recovering possession of his property from the wrongful occupation of plaintiffs.

If landlords are thus to be deprived of effective access to summary proceedings under the unlawful detainer laws whenever a tenant alleges that the landlord is proceeding discriminatorily, tenants could wrongfully retain possession of premises throughout the course of protracted litigation merely by asserting in a responsive pleading that the landlord was discriminatory. (The rationale of the court below would not seem be confined to racial discrimination but should extend to any arbitrary conduct forbidden the States by the Fourteenth Amendment). That the landlord might ultimately prevail would be of little solace. He would have lost the use of, and perhaps also the income from his property throughout the pendency of the litigation, perhaps as much as five years or more. That such a state of the law would in practical terms do much to discourage the rental of property to Negroes can hardly be doubted.

If Mr. Snyder is denied the only remedy the law permits to recover his property, the result would be the elimination without his consent of the only provision of the oral month-to-month tenancy he granted which distinguishes it from a tenancy for a term. The result would be comparable to a reverse decree of specific performance in favor of the tenants of a contract they did

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[66]Code of Civil Procedure, §§ 1159 and 1160, *et seq.*

not have, the abrogation of a tenancy-at-will to which the parties had agreed, and the imposition upon landlords without benefit of any statute so providing of the heavy burden of disproving a racial motive when dealing with Negro tenants.[67] Mr. Snyder would be deprived of his property in a very real and tangible sense without any legislative justification and without due process of law. He would be denied the equal protection of the California unlawful detainer laws. *Buchanan v. Warley*, 245 U.S. 60; *Bell v. Maryland*, 378 U.S. 226, 318 (dissenting opinion).

D. To Adopt California's Expansive Construction of Shelley v. Kraemer Would Compel This Court to Resolve in an Inevitably Fragmentary Manner a Host of Constitutional and Psychiatric Problems in a Multitude of Otherwise Routine Private Disputes and Thereby Impose an Insuperable Burden Upon This Court as an Institution.

If the California Supreme Court interpretation of *Shelley* is not reversed, an issue of Constitutional proportions and psychiatric overtones may be presented by virtually every dispute between members of different racial, religious or political groups. The inevitable result will be the elimination of stability in a myriad of economic transactions, a shattering of a portion of

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[67] See *e.g., Rice v. Sioux City Memorial Cemetery*, 245 Iowa 147, 60 N.W. 2d 110, 115, aff'd, 348 U.S. 880, vac. and cert. dismissed, 349 U.S. 70; *Segre v. Ring*, 103 N.H. 278, 170 A. 2d 265, 266 where the court said regarding an unequivocal restriction against assignment in a lease: "The Court will not rewrite the agreement to compel the [lessor] . . . to permit the assignment or to give their reasons for not doing so." See also, 32 Am. Jur., Landlord and Tenant, §343.

the law of wills and property,[68] an inestimable increase in the costs of collection on defaulted obligations, a consequent reluctance to deal with members of minority groups, and an enormously expanded responsibility and burden on this Court quite out of keeping with the limited role of both this Court and the Federal Government under the Fourteenth Amendment. In short, the Constitutional doctrine adopted below would require this Court on a case by case basis to determine, without benefit of either the investigative resources of a legislature or any means of measuring the temper of the people, whether private conduct in an infinite variety of contexts should be subjected to the standards imposed upon the States by the Fourteenth Amendment.

We submit that *Shelley* was not intended to and does not impose so onerous a burden on this Court. Nor is the burden one that this Court should willingly shoulder. As former Solicitor General Archibald Cox argued in the *amicus* brief filed on behalf of the United States in the 1964 sit-in cases:

> ". . . there remains the difficulty that imposing State responsibility upon the basis of jural recognition of a private right turns all manner of private activities into constitutional issues, upon which neither individuals nor the Congress nor the States—but only this Court—could exercise the final judgment."

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[68]Professor Herbert Wechsler in "The Nature of Judicial Reasoning," Part III, C, p. 295 of *Law and Philosophy*, N.Y. Univ. Press, 1964: ". . . But such a proposition is absurd and would destroy the law of wills and a good portion of the law of property, which is concerned precisely with supporting owners' rights to make discriminations that the state would not be free to make on the initiative of officials. * * *"

"The preservation of a free and pluralistic society would seem to require substantial freedom for private choice, in social, business and professional associations. Freedom of choice means the liberty to be wrong as well as right, to be mean as well as noble, to be vicious as well as kind. And even if that view were questioned, the philosophy of federalism leaves an area for choice to States and their people, when the State is not otherwise involved, instead of vesting the only power of effective decision in the federal courts.

"Nothing in the Court's decisions or elsewhere in constitutional history suggests that the Fourteenth Amendment's prohibitions against State action put such an extraordinary responsibility upon the Court. It seems wiser and more in keeping with our ideals and institutions to recognize that neither the jural recognition of a private right nor securing the right through police protection and judicial sanction is invariably sufficient involvement to carry State responsibility under the Fourteenth Amendment.

* * *

"We read *Shelley v. Kraemer* as an instance of this moderate view. * * *"[69]

For all of these reasons we urge this Court to declare that the Constitution does not oblige every State court to close its doors to all litigants whose motives are tarnished by their dislike for the race, religion, or political views of their adversaries.

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[69]Supplemental Brief of the United States as Amicus Curiae (in *Griffin v. Maryland*, 378 U.S. 130; *Barr v. Columbia*, 378 U.S. 146, *Bowie v. Columbia*, 378 U.S. 347; *Bell v. Maryland*, 378 U.S. 226, and *Robinson v. Florida*, 378 U.S. 153) at pages 87-88.

Conclusion.

For the reasons stated *Mulkey v. Reitman* should be remanded to the court below with instructions to affirm the judgment of the trial court dismissing the complaint [R. 13]; and *Prendergast v. Snyder,* should be remanded with instructions to reverse the judgment of the trial court [R. 79] and direct it to grant the relief prayed for by Mr. Snyder in his cross-complaint [R. 63].

Respectfully submitted,

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